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No. 84-579

In the Supreme Court of the United States

OCTOBER TERM, 1984

SAMUEL SCHUSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner voluntarily waived his right to a jury trial and agreed to a trial on stipulated facts and evidence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 734 F.2d 424.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1984. A petition for rehearing was denied on August 10, 1984 (Pet. App. A8). The petition for a writ of certiorari was filed on October 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on stipulated facts and evidence before the United States District Court for the Central District of California, petitioner was convicted on one count of conspiracy to launder money received from narcotics transactions, in violation of 18 U.S.C. 371. Petitioner was sentenced to five years' imprisonment and a fine of $10,000. The court of appeals affirmed (Pet. App. A1-A4).

1. Petitioner was charged in seven counts of a 19-count indictment with offenses related to a scheme to launder $29,000,000 in currency derived from narcotics sales. Count 1 charged that petitioner participated in a conspiracy to cause financial institutions to fail to file currency transaction reports (in violation of 31 U.S.C. 5322), to fail to file currency transaction reports (in violation of 31 U.S.C. 5322), to violate the Travel Act (18 U.S.C. 1952), and to defraud the government by obstructing the lawful functions of the Internal Revenue Service (in violation of 18 U.S.C. 371). Petitioner was also charged in a second conspiracy count and five substantive counts. Excerpt of Record (E.R.) 1-28.

The trial of petitioner and five co-defendants began on March 8, 1983. On March 30, 1983, the court granted a motion for mistrial with respect to petitioner and three of his co-defendants, and their trial was severed. See E.R. 37-38.

2. On May 19, 1983, petitioner signed a waiver of his right to a jury trial and requested to be tried by the court (E.R. 29). His counsel signed a statement on the waiver form representing that petitioner "was fully advised as to the rights of an accused under the Constitution and laws of the United States to a speedy and public trial by jury" and counsel's belief that the waiver was "voluntarily and understandingly made" (*ibid.*).

On the same day, petitioner, his counsel, and the prosecutor entered into a stipulation reciting that petitioner "has agreed to waive trial by jury and to proceed to trial before the court on count one" on the stipulated facts and evidence, in exchange for which the government agreed to dismiss the six other counts against petitioner if he were found guilty on the conspiracy charge (E.R. 30). The stipulation incorporated by reference the testimony of two witnesses at the trial of some of petitioner's co-defendants. It

specified that two admitted members of the conspiracy testified that petitioner gave others large sums of money for laundering, that he was present during conversations concerning the bribery of bank officers, and that he was paid fees for laundering money and paid fees to others during the course of the scheme. The stipulation further specified that an agent of the Drug Enforcement Administration testified that a ledger taken from the residence of a co-defendant showed large currency transactions with "Samuel," and that, in the agent's expert opinion, the ledger reflected sales of cocaine on credit and disbursements of money derived from those sales. The stipulation also stated that several recorded conversations between petitioner and his co-defendants concerned wire transfers of laundered funds and arrangements made by petitioner for one of his co-defendants to pick up large quantities of currency. *Id.* at 30-36.

Following a colloquy with petitioner's counsel and an inquiry of petitioner, the court accepted the waiver and stipulation. Counsel represented that he advised petitioner "that the government still has the ultimate obligation of proving the elements of the crime charged to the exclusion of every reasonable doubt" and that, should he be found guilty, his "rights to appeal" would be "preserve[d]." Pet. App. A5. Petitioner responded affirmatively when asked by the court whether he concurred in his counsel's statement as to "the conditions under which [he] executed the stipulation of facts and the waiver of trial by jury" (*id.* at A6).

Counsel then argued to the court that the stipulated facts did not establish petitioner's guilt (Tr. 6-12). He stated that "there is no evidence that [petitioner] knew that he was doing something wrong" and that the stipulated facts did not show the agreement necessary to prove a conspiracy (Tr. 7-8). The court convicted petitioner, finding that three of the four objects of the conspiracy had been proved beyond a reasonable doubt (Pet. App. A7).

3. The court of appeals affirmed (Pet. App. A1-A4). The court rejected petitioner's arguments that the district court was required to advise him of his right to confrontation and that the evidence was not sufficient to support his conviction. The court noted that petitioner "did not stipulate to facts conclusively demonstrating his guilt in order to preserve his right to raise an affirmative defense on appeal" (*id.* at A3). In light of petitioner's "vigorous attack on the sufficiency of the evidence," it was clear to the court that the stipulation did not amount to a "de facto plea of guilty" (*ibid.*). The court concluded that petitioner "voluntarily consented to a court trial based on stipulated facts" (*id.* at A4).

ARGUMENT

Petitioner contends (Pet. 7-16) that the district court erred in not advising him of his right to confront the witnesses against him, which he waived as a result of his agreement to be tried on the basis of the stipulation. Despite his allegation of a conflict among the circuits, petitioner does not cite a single case establishing a rule under which his conviction would be set aside. The district court adequately established the voluntariness of petitioner's decision to waive his right to a jury trial and to proceed on the facts and testimony embodied in the stipulation. Petitioner's claim to the contrary does not warrant further review, especially in light of the absence of prejudice and the diminished significance of stipulated-facts trials following the recent amendment to the Federal Rules of Criminal Procedure authorizing conditional guilty pleas.

1. Petitioner's agreement to be tried on the basis of the stipulation is constitutionally unobjectionable so long as he "knew what he was doing when he entered into the stipulation." *United States* v. *Stalder*, 696 F.2d 59, 62 (8th Cir. 1982); see, *e.g.*, *United States* v. *Tobin*, 701 F.2d 1108, 1110

(4th Cir. 1983); *United States* v. *Lawson*, 682 F.2d 1012, 1016 (D.C. Cir. 1982); *United States* v. *Terrack*, 515 F.2d 558, 560 (9th Cir. 1975). The court of appeals correctly applied that rule to the facts of this case. There plainly was an adequate waiver of petitioner's right to a jury trial, the "critical decision" (*Lawson*, 682 F.2d at 1016) involved in the agreement to a trial on stipulated facts. He signed a standard waiver form, and the court expressly inquired of petitioner as to his waiver (see pages 2-3, *supra*). Petitioner also affirmed to the court his understanding of the effect of the stipulation (page 3, *supra*). Petitioner does not contend that the stipulation was the result of "prosecutorial over-reaching, * * * * * that he was under any compulsion to make the challenged stipulation or that he had ineffective assistance of counsel." *United States* v. *Robertson*, 698 F.2d 703, 708-709 (5th Cir. 1983). The court's inquiry was sufficient to demonstrate that petitioner acted voluntarily and understood the consequences of his decision. The fact-bound claim to the contrary, rejected by the court below, does not merit this Court's review.

In particular, the record amply supports a conclusion that petitioner was aware of and voluntarily chose to forgo his confrontation rights. Only two months before, petitioner had been tried before a jury (see page 2, *supra*). In light of this experience, he surely knew of the right of cross-examination; nothing in the record suggests he did not. And by entering into the stipulation, petitioner must have been aware that he would not be receiving a trial at which witnesses would be called and cross-examined. As the court noted in *United States* v. *Stalder* (696 F.2d at 62), in rejecting a similar challenge to a stipulation:

> The claim that the defendant thought that he was waiving only a jury trial, and that some kind of court trial would still take place, is simply untenable on the

> face of the record. The colloquy as a whole reflects clearly not only that a jury trial was waived, but that no trial at all would take place * * * .

See generally *Diaz* v. *United States*, 223 U.S. 442, 452-453 (1912) ("the accused, by his voluntary act, placed in evidence the testimony disclosed by the record in question, and thereby sought to obtain an advantage from it[;] he waived his right of confrontation as to that testimony and cannot now complain of its consideration"). On these facts, further inquiry by the district judge — who had presided at petitioner's earlier trial — was not required.

2. There is no basis for petitioner's proposed requirement that he be advised by the court of his confrontation rights.[1] Petitioner analogizes to Fed. R. Crim. P. 11(c), which requires that the court inform a defendant of specified rights before accepting a plea of guilty or nolo contendere.[2] Petitioner did not, however, stipulate to facts conclusively demonstrating his guilt. To the contrary, petitioner

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[1]This Court's cases addressing the question of waiver of confrontation rights do not support petitioner's argument. Those cases do not impose a requirement that the court advise a defendant with respect to his confrontation rights. Moreover, they arose in quite different circumstances from this case and do not suggest that judicial advice is required on these facts, where petitioner expressly agreed with his counsel's decisions and representations. See *Barber* v. *Page*, 390 U.S. 719, 725 (1968) (failure to cross-examine witness at preliminary hearing not a waiver of confrontation rights at trial); *Brookhart* v. *Janis*, 384 U.S. 1, 7 (1966) (counsel's waiver was "inconsistent with his client's expressed desire"); *Douglas* v. *Alabama*, 380 U.S. 415, 420-423 (1965) (counsel's failure to continue objecting to each question after objecting three times did not constitute a waiver).

[2]Rule 11(c) provides:

> Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any,

argued the sufficiency of the evidence to both courts below, and his stipulation was not only to facts, but to testimony that need not have been credited by the court. See, *e.g.*, *United States* v. *Dorsey*, 449 F.2d 1104, 1108 (D.C. Cir. 1971). Under these circumstances, Rule 11 plainly does not apply. See, *e.g.*, *United States* v. *Lawson*, 682 F.2d at 1015 ("[i]n cases where defendants have not admitted guilt and waived trial on all issues, courts have uniformly held that a Rule 11 inquiry is not required"); *United States* v. *Stalder*, *supra* (Rule 11 does not apply even where defendant effectively stipulates to his guilt); *United States* v. *Terrack*, *supra* (same).[3]

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and the maximum possible penalty provided by law, including the effect of any special parole term; and

* * * * *

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if his plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial;

[3]It has been suggested that Rule 11 should apply (at least in part) when the defendant, in effect, stipulates to his guilt in order to obtain appellate review of a pretrial ruling. See *Witherspoon* v. *United States*, 633 F.2d 1247 (6th Cir. 1980), cert. denied, 450 U.S. 933 (1981); *United States* v. *Strother*, 578 F.2d 397 (D.C. Cir. 1978). Although we believe that this suggestion is wrong — Rule 11 by its terms applies only to guilty and nolo contendere pleas, which have different consequences from trials even where all facts are stipulated —that question is not presented here, because petitioner's stipulation did not effectively constitute a plea of guilty.

Petitioner was in any event not prejudiced by the district court's failure to inquire more fully into the circumstances surrounding his agreement to the stipulation. Even under Rule 11, a departure from the specified procedures may constitute harmless error (Fed. R. Crim. P. 11(h)). Petitioner was present at his trial; his chief complaint seems to involve the incorporation by reference of testimony from the trial of his co-defendants. But such incorporation is not in itself improper. See, *e.g., United States* v. *Dorsey, supra.* Petitioner does not suggest that the content of the testimony was unknown to him or that the district court's reliance on it came as a surprise. Compare *Julian* v. *United States*, 236 F.2d 155, 158 (6th Cir. 1956) ("it is not contended that defendant acquiesced in or approved of the stipulations of defense counsel"). Nor does petitioner point to other facts suggesting that he might not have entered into the stipulation, or that he might have changed it, had he been questioned more extensively by the court. Moreover, petitioner does not suggest that the government would not have been able to prove any of the facts to which he stipulated.[4] Under these circumstances, any error was harmless. See *United States* v. *Hasting*, 461 U.S. 499 (1983); compare *United States* v. *Brown*, 428 F.2d 1100, 1103 (D.C. Cir. 1970) (inquiry before accepting stipulation required where the "defendant [was] admittedly suffering from a mental disorder").

3. Finally, Rule 11 was amended in 1983 to provide for conditional guilty pleas, which permit a defendant, with the approval of the court and the government, to enter a plea of guilty while reserving the right to appeal from an adverse

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[4]Petitioner's two co-conspirators who did not obtain a mistrial were convicted at the trial during which the testimony incorporated in the stipulation was given. The district court commented on the similarity between the contents of the stipulation and the evidence produced at the earlier trial (Pet. App. A7).

determination of a pretrial motion (Fed. R. Crim. P. 11(a)(2)). While this procedure is not available to preserve every challenge that a defendant might wish to pursue on appeal,[5] it will often obviate the need to employ the device of a trial on stipulated facts. See, *e.g.*, *United States* v. *Stalder*, 696 F.2d at 60 n.2; *United States* v. *Dorsey*, 449 F.2d at 1108 n.18 (problems relating to stipulated-facts trials arise because defendants are unable to obtain appellate review of rulings on suppression motions if they plead guilty). Questions related to trials on stipulated facts can therefore be expected to arise with less frequency than they may have under prior law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]See, *e.g.*, *United States* v. *Curcio*, 712 F.2d 1532, 1537 (2d Cir. 1983). The procedure would not, for example, preserve for appellate review issues that can only be addressed on a full trial record, such as the sufficiency question raised below.